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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE HONORABLE WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE OF THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, HO-CHUNK NATION, ST. CROIX BAND OF CHIPPEWA INDIANS AND STANDING ROCK SIOUX TRIBE, *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici are all federally-recognized Indian tribes. All *Amici* tribes have established businesses and economic activities on their reservation lands in recent years in an effort to promote economic development. On all *Amici* reservations, *Amici* tribes have established tribal courts to enforce applicable laws and resolve disputes arising on reservation lands. Non-Indians are frequently present on

reservation lands as residents or in connection with employment, leases or contracts with tribal governments and enterprises, or as patrons of tribal businesses. With increased commercial activity occurring on Indian lands in recent years, *Amici* have experienced a substantial increase in civil cases involving non-Indians in their tribal courts. *Amici's* tribal courts regularly hear and resolve such cases. Therefore, *Amici* have an interest in a recognition of their sovereign authority to establish and maintain tribal courts to adjudicate disputes involving non-Indians. *Amici* consider such a recognition critical to a well ordered civil society and to promoting economic development in *Amici's* reservation communities.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

1. For decades, this Court has held that tribal courts have civil adjudicatory jurisdiction over cases involving non-Indian parties. *E.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Williams v. Lee*, 358 U.S. 217 (1959). As the Court stated in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted), "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." In *LaPlante*, the Court held that civil jurisdiction over cases arising on a reservation involving non-Indians "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18.

2. Congress has "consistently encouraged . . . [the] development" of tribal courts. *LaPlante* at 14-15 and n.6. In 1993, for example, Congress enacted the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq., inter alia*, to provide federal funding support for tribal courts equal to that of equivalent state courts. In the 1993 Act, Congress recognized that, as this Court held in *LaPlante*, the general rule is that civil jurisdiction over cases arising on a reservation presumptively lies in tribal courts, and found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5).

3. The authority of a sovereign to adjudicate civil disputes arising on its territory is an essential attribute of sovereignty, even if the cases involve visitors. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Nevada v. Hall*, 440 U.S. 410, 424 (1979); *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). Tribes have the same need for civil adjudicatory authority as any other sovereign to ensure persons who enter their reservations to reside, or do business, with tribal entities or members can rely upon a stable legal system available to resolve disputes that may arise concerning them. Otherwise, tribes will be unable to achieve economic self-sufficiency for their members, or to provide for the welfare of all reservation residents and visitors.

4. This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1992) and *South Dakota v. Bourland*, 508 U.S. ——, 124 L.Ed.2d 606 (1993), do not apply to determinations of tribal court authority in civil cases involving only non-Indian parties. Those cases involve statutes where Congress divested tribes of title to lands and intended to abrogate tribes' regulatory authority over non-Indians purchasing or entering those lands pursuant to the invitation of Congress. By contrast, Congress has repeatedly demonstrated the intent to protect and support tribal court authority to adjudicate civil cases involving non-Indians. Moreover, the circumstances of

the non-Indian parties in this case—a long-time reservation resident related to tribal members and a contractor entering the reservation to do business with the Three Affiliated Tribes—are very different from homesteaders purchasing former tribal lands under a statutory scheme where Congress intended ultimately to dissolve tribal relations and the authority of tribal governments and to assimilate tribal members.

5. Even if the standards of *Montana* apply here, tribal civil authority exists because both non-Indian parties here have entered into consensual relationships with the Three Affiliated Tribes, and the activities of the non-Indian Respondents are claimed to have threatened the public health, welfare and safety of the Tribes and tribal members by operating an automobile on reservation roads in a manner that endangered persons and property.

ARGUMENT

TRIBAL COURTS RETAIN ADJUDICATORY JURISDICTION TO RESOLVE A CIVIL TORT ACTION BETWEEN NON-INDIANS ON A RESERVATION HIGHWAY.

A. This Court Has Long Held That Tribal Courts Have Authority as Part of Tribes' Inherent Sovereignty To Adjudicate Civil Disputes That Arise on Reservations Involving Non-Indians.

It has been settled for at least 100 years that tribes have authority to establish courts on reservations as part of their own inherent sovereignty, separate and independent from federal authorization. *Talton v. Mayes*, 163 U.S. 376 (1896). In *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that tribal courts have jurisdiction exclusive of state courts over a civil suit by a non-Indian reservation trader to collect a debt from an Indian, because "the exercise of state jurisdiction . . . would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. *Williams* conclusively sustains a tribal court's authority to determine disputes involving a non-Indian party. *See also McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 179 (1973) ("cases applying the Williams test have dealt principally with situations involving non-Indians"). As the Court stated in *Williams*: "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations." *Id.* at 223 (citations omitted).

The Court concluded in *United States v. Mazurie*, 419 U.S. 544, 557 (1975), that "Indian tribes within 'Indian country' are a good deal more than 'private voluntary organizations,' " but rather "are unique aggregations possessing attributes of sovereignty over both their members and their territory," and relying upon *Williams v. Lee*, affirmed tribal authority over non-Indians. *Id.* at 558. It was thus well established two decades ago that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted).

By contrast, the Court decided in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209-12 (1978), that tribal courts' *criminal* jurisdiction over non-Indians had been implicitly divested because of tribes' incorporation into and dependency upon the protection of the United States. The Court in *Oliphant* carefully examined numerous statutes and treaties in which Congress had repeately assumed that tribes did not have criminal jurisdiction over non-Indians. *Id.* at 197-99 and n.8, 201-08. For example, the Court relied upon statutes in force since 1817 that extend federal enclave law to confer jurisdiction on federal courts to punish crimes committed in Indian country by non-Indians with Indian victims. *Id.* at 201, 203.

This Court's decisions subsequent to *Oliphant*, however, have adhered to the Court's tradition of protecting tribal

courts' civil adjudicatory authority recognized in *Williams v. Lee* and other earlier cases.[1] In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854 (1985), the Court held that "[f]or several reasons, . . . the reasoning of *Oliphant* does not apply" to bar tribal courts from adjudicating civil suits with non-Indian parties. First, the Court observed that in contrast to Congress' creating federal criminal jurisdiction over non-Indians committing crimes on reservations, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes betwen Indians and non-Indians that arise on an Indian reservation." *Id.* The Court also

[1] The Court has also sustained tribes' power in other civil areas —to tax non-Indians doing business on reservation trust lands, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144, 159 (1982); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985), and to regulate hunting and fishing by non-Indians on trust lands. *Montana v. United States*, 450 U.S. 544, 557 (1981). These cases followed, and some of them specifically relied upon, the Court's much earlier decision sustaining a tribal permit tax imposed on non-Indians in *Morris v. Hitchcock*, 194 U.S. 384 (1904). *See Merrion*, 455 U.S. at 142; *Colville*, 447 U.S. at 153.

The Court in *Colville* relied upon opinions by "Executive Branch officials . . . [that] consistenly recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest," *id.* at 152, and observed that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" and that "[n]o federal statute . . . shows any congressional departure from this view." *Id.* at 153. The Court held that "[i]n these respects the present cases differ sharply from *Oliphant* . . . in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians." *Id.* Thus, the Court concluded in *Colville* that tribal civil powers to tax "are not implicitly divested by virtue of the tribes' dependent status." *Id.* In *Merrion*, the Court relied on *Colville* to hold that "[t]he power to tax is an essential attribute of Indian sovereignty," 455 U.S. at 137, and "an inherent power necessary to tribal self-government and territorial management." *Id.* at 141.

relied on an Attorney General's Opinion in the mid-nineteenth century concluding that tribes had no criminal jurisdiction over non-Indians but did retain the power to determine civil controversies arising on their reservations. *Id.* at 854-55. The Court therefore concluded that "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case . . . [involving a tort committed on an Indian child on reservation fee lands] is not automatically foreclosed" by implication as a result of the incorporation of tribes into the United States as domestic dependent sovereigns. *Id.* at 855. In *National Farmers Union*, the Court held that examination of the tribal court's jurisdiction "should be conducted in the first instance in the Tribal Court itself," *id.* at 856, and the federal court should stay or dismiss a case over which it has jurisdiction until that examination is completed. *Id.* at 857.

Two years later in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the Court confirmed that tribal courts "presumptively" have subject-matter jurisdiction over civil cases involving non-Indians on a reservation, because "[t]ribal authority over the activities of non-Indians on reservation land is an important part of tribal sovereignty," *id.* at 18, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *Id.* at 14-15 (citation and footnote omitted). Since the Court had already held in *National Farmers Union* that tribal court civil adjudicatory jurisdiction over activities by non-Indians on reservations—unlike the criminal jurisdiction precluded in *Oliphant*—is not "automatically foreclosed" by tribes' dependent status vis-a-vis the United States, the Court in *LaPlante* concluded that such jurisdiction "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.[2]

[2] This Court subsequently observed in *Duro v. Reina*, 495 U.S. 676, 687-88 (1990) (citations omitted):

> [o]ur decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve

The only difference between the present case and *National Farmers Union* and *LaPlante* is that in those cases one party was a tribal member. Respondents did not contend below that any statute or treaty provision specifically divests the Three Affiliated Tribes of authority to establish tribal courts of general jurisdiction to resolve a tort case involving only non-Indians on reservation lands. The tribal court of appeals held there is no action of Congress or treaty that has done so. (Jt. App. at 35.) Accordingly, under *LaPlante* and predecessor decisions of this Court dealing with tribal court civil jurisdiction, the tribal courts of the Three Affiliated Tribes retain that authority. This result is supported as well by the treatment Congress has given to tribal court civil jurisdiction, which we discuss in the next section.

B. Congress Has Encouraged Tribal Courts To Develop and Operate Effectively, and Assumed These Courts Exercise General Civil Adjudicatory Jurisdiction Over Non-Indians.

As the Court noted in *LaPlante*, 480 U.S. at 14-15 and n.6, Congress has "consistently encouraged . . . [the] development" of tribal courts. For example, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*, required tribal courts to adhere to most requirements of the Bill of Rights, provided special training for tribal judges and directed the Interior Department to prepare a model code to govern the tribes' administration of justice. 25 U.S.C. §§ 1302, 1311. Public Law 102-137 altered the result of this Court's decision in *Duro v. Reina*, 495 U.S. 679 (1990), to confirm tribes' inherent criminal jurisdiction over Indians of other tribes.[3]

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civil disputes involving nonmembers, including non-Indians . . . .

[3] *See also United States v. Wheeler*, 435 U.S. 313, 325 (1978):

[I]n 1854 Congress expressly recognized the jurisdiction of tribal courts when it added another exception to the General Crimes Act, providing that federal courts would not try an Indian 'who has been punished by the local law of the tribe'

Most recently, Congress in 1993 enacted the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.*, establishing a special Office of Tribal Justice Support within the Bureau of Indian Affairs to provide funds, training and technical assistance to tribal court systems. *Id.* at § 3611. It also established a new system for base support funding for tribal justice systems, *id.* at § 3613, and authorized $50 million a year to be appropriated for this purpose, *id.* at § 3621(b)—which was about *four times* the amount of prior federal support provided to tribal courts. H. Rep. No. 103-205, 103d Cong., 1st Sess. 27 (1993) (hereafter "House Report"); S. Rep. No. 103-88, 103d Cong., 1st Sess. 3 (1993) (hereafter "Senate Report"). This increased funding was intended to implement recommendations of the United States Commission on Civil Rights to authorize spending for tribal courts in amounts equal to that of equivalent state courts. 139 Cong. Rec. H10262 (remarks of Representative Miller, Chairman, House Committee on the Interior and Insular Affairs). In addition, $7,000,000 per year were authorized to, *inter alia*, assist tribal courts to develop tribal codes and rules of procedure, tribal court administrative procedures and court records management systems, and tribal standards for judicial administration and conduct. 25 U.S.C. §§ 3611(e), 3621(a).

In the 1993 Act itself, Congress specifically found that "Indian tribes possess the inherent authority to establish . . . tribal justice systems" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. § 3601(4) and (6). The Senate Report makes it clear that the latter finding "was added to emphasize that tribal courts are permanent institutions charged with resolving

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. . . . Thus, far from depriving tribes of their sovereign power to punish offenses against tribal law by members of the tribe, Congress has repeatedly recognized that power and declined to disturb it.

the rights and interests of both Indian and non-Indian individuals." Senate Report at 8. The House Report echoed this understanding, relying on *LaPlante,* that:

> As for non-criminal jurisdiction, Indian tribes have the inherent right to exercise civil jurisdiction within the territory it [sic] controls. Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. Hence, non-Indians may be sued in tribal court.
>
> * * * *
>
> The general rule is civil jurisdiction 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.' *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. (1987) at 18.

House Report at 8-9.[4]

When it enacted the Indian Tribal Justice Act, Congress also expressly found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5). This finding was added to the Act by the Senate Committee on Indian Affairs:

> to reflect the decision of the United States Supreme Court in the case of *Montana v. United States,* 450 U.S. 544 (1981), with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents

[4] The Conference Committee Report likewise stated:

> The Conferees recognize the long standing principle that Indian tribes retain all sovereign authority not expressly divested by the Congress. This principle was articulated by the Supreme Court in *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9 (1987). The Supreme Court recognized that civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.' 480 U.S. 9 (1987) at 18.

Conf. Rep. No. 103-383, 103d Cong., 1st Sess. 13 (1993) (footnote omitted).

> and the political integrity of the tribe. From all of the testimony presented to the Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.

Senate Report at 8.

More broadly, the Senate Report concluded that:

> Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments. Except where the Congress has established that federal jurisdiction is exclusive, tribal courts hear cases on virtually all aspects of governmental and private activity. . . .
>
> * * * *
>
> It is the Committee's view that strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments.

Senate Report at 3. As Senator Inouye, Chairman of the Senate Indian Committee, told the Senate when he presented the Indian Tribal Justice Act to the floor.

> While it is a bill that reflects compromise, more fundamentally, it represents the preservation of the sovereign authority of tribal governments to determine the future of their tribal justice systems. Sovereign nations, no matter how limited or expansive their sovereignty might be, can only exercise that sovereignty through the legal systems they develop to implement civil and criminal codes and to enforce regulatory provisions.

139 Cong. Rec. S9176 (1993).

C. The Exercise of General Jurisdiction To Adjudicate Civil Disputes Arising on a Sovereign's Territory, Whether Involving Citizens or Noncitizens, Is an Essential Attribute of Sovereignty for Tribes as Well as Other Governments.

The actions of Congress and this Court protecting the authority of tribes to establish courts exercising general civil adjudicatory jurisdiction over reservations are complemented by this Court's more general recognition of the interests any sovereign has in providing a forum for resolution of disputes arising on that sovereign's territory but involving noncitizens. Chief Justice Marshall long ago noted the importance to the functions of a government of making courts available for the resolution of disputes and enforcing the law, observing:

> No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821); *see also Henry M. Hart, Jr.* and *Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law* 342-43 (Eskridge and Frickey, ed. 1994) (noting the dispute settlement function of courts is important "to the good ordering of society"). Indeed, "[t]he federal interest in ensuring that all citizens have access to the courts is obviously a weighty one." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 888 (1986).

This Court has also recognized in the context of choice-of-law cases the interests of a sovereign in providing a judicial forum for the resolution of disputes and applying its law to such actions, even those disputes involving transitory tort claims. *See, e.g., Allstate Ins. Co. v. Hague*,

449 U.S. 302 (1981); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *McKenna v. Fisk*, 42 U.S. (1 How.) 241 (1843). It has determined that a sovereign has an interest in enforcing the legal rights of all those in its territory, residents and nonresidents, who suffer from the negligence of another. *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (state has an interest in "providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents' ") (citation omitted); *Carroll v. Lanza*, 349 U.S. 408, 413 (1955) (state has interest in "opening her courts" to suits brought by nonresidents injured while temporarily employed in state and "to apply its own rule of law to give affirmative relief for an action arising within its borders").

Accidents on highways implicate the interests of a government in promoting safety on its roads for all who use them. *See Allstate*, 449 U.S. at 314 (state has valid concern for safety and well-being of nonresidents temporarily in state); *Washington Gas Light*, 448 U.S. at 277 (same). An accident may highlight other social problems that concern the sovereign, such as high rates of drug or alcohol use among drivers, underage drivers, or uninsured drivers. They may also indicate a need for safety belt laws, child restraint requirements, or modifications in the roads or road signage. Accidents also implicate the government's interest because they frequently require governmental services to address the effects of such accidents. The injured may require ambulance services, medical attention, or other services. *See Allstate*, 449 U.S. at 314 (nonresidents injured in state "may call upon state facilities in appropriate circumstances"); *Carroll*, 349 U.S. at 413 (state where tort involving nonresidents occurs "certainly has a concern in the problems following in the wake of the injury"). Thus adjudication of disputes arising out of accidents is important for the development and enforcement of governmental policy. *See Nevada*, 440 U.S. at 424; *Carroll*, 349 U.S. at 413.

These consequences and impacts are as true for tribes as for any other government. Tribes today do not usually live "in separate and isolated communities, adhering to primitive modes of life." *United States v. Sandoval*, 231 U.S. 28, 39 (1913). Instead, tribes engage in major commercial ventures to attract non-Indians to their reservations to do business and interact with the tribal community. For example, *Amicus* Assiniboine and Sioux Tribes and Indian allottees on its reservation derive major revenues from leasing trust lands to non-Indian companies which produce several million dollars worth of oil annually. *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). *Amici* Ho-Chunk Nation, St. Croix Band of Chippewa Indians, Confederated Tribes of the Colville Reservation ("Colville Tribes"), and Standing Rock Sioux Tribe operate gaming casinos and related recreational establishments on reservation lands. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Other tribes promote tourism. *E.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). *Amicus* Colville Tribes operate numerous enterprises related to their timber resources which employ hundreds of individuals on the reservation, including non-Indians. The Colville Tribes also frequently enter into contracts with non-Indian businesses on the reservation in connection with their forestry enterprises. A great many residents on *Amici's* reservations are non-Indians or Indians of other tribes who have married tribal members, like the plaintiff who filed this case, or are employed by the tribe or federal agencies serving the tribe. *Cf. Duro v. Reina*, 495 U.S. 676, 695 (1990).

As Congress found in the Indian Tribal Justice Act, 25 U.S.C. § 3601(4), (5) and (6), the availability of tribal forums to resolve civil disputes in an effective and predictable fashion is essential if the tribes are to maintain a reservation environment that can attract non-Indians to engage in business, lease trust lands, recreate upon or tour the reservation and thereby fulfill the congressional

purpose of promoting tribal economic development.[6] As the Court recognized in *Cabazon*, 480 U.S. at 219, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." A necessary condition for reaching these goals is a stable reservation legal environment where those civil disputes which will inevitably arise can be fairly and efficiently resolved. As the Court observed in *United States v. Wheeler*, 435 U.S. 331-32 (1978)—albeit in the different context of tribal court criminal jurisdiction over tribal members—tribes "have a significant interest in maintaining orderly relations" and "tribal courts are important mechanisms for protecting significant tribal interests."

This is why today tribes have found it essential to establish tribal courts with general jurisdiction to resolve civil disputes brought before them that arise on the reservation. On all of *Amici* tribes' reservations, the tribal courts, including appellate courts, routinely and successfully adjudicate cases involving non-Indian parties. For example, since June 1995, approximately 94 civil cases have been filed in the tribal court of *Amicus* Ho-Chunk Nation. In 25 cases the plaintiff was a non-Indian, seven of which have been resolved in whole or part in favor of the plaintiff and three in favor of the defendant. In 1995, the tribal court of *Amicus* Assiniboine and Sioux Tribes heard 84 cases in which the plaintiff was a non-Indian. In 58 of those cases, the court issued judgment in favor of the non-Indian plaintiff. The tribal court also heard

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[6] This Court has repeatedly held that economic development is a major goal of Congress' Indian policy. *E.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development' "); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n.10 (1980) (describing "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self sufficiency and economic development").

16 cases in which the defendant was a non-Indian, and the court dismissed the action or entered judgment in favor of the non-Indian in eight of those cases. The tribal court of *Amicus* Colville Tribes heard several hundred civil cases, many involving non-Indian parties, in the last year. The Colville Tribes have recently entered into an agreement with the State of Washington providing for modification and enforcement of child support awards against tribal members in tribal court, and it is expected that the State will file hundreds of cases next year in tribal court as the plaintiff. The tribal court of *Amicus* Standing Rock Sioux Tribe also regularly hears suits brought by non-Indians, including actions involving debt collection, repossession of automobiles, livestock trespass, child support, and paternity. The tribal court recently heard a suit brought by a subdivision of North Dakota, Sioux County, against an Indian employee of the County for damages. Many if most judges in the tribal courts maintained by *Amici* are trained lawyers. The tribal courts, of course, apply the pertinent law to any case where they have jurisdiction—whether the source of that law is tribal, federal or state.

Non-Indians entering a reservation to do business with a tribe—like the Respondents in this case—and non-Indians residing on a reservation as a widow and mother of tribal members—like the non-Indian Petitioner in this case—often expect, indeed depend upon, the existence of a stable legal system and tribal court to resolve any civil dispute that may arise concerning their activities. If, as happened here, a non-Indian driving on the reservation collides with another non-Indian, the accident is typically investigated by tribal police, witnessed by Indians who reside on the reservation, and any injuries are treated at least initially by the tribal health clinic.[6] Evidence needed at

[6] Since, as the tribal court noted, "the Court is faced with a somewhat bare record on the facts of this case," (Jt. App. at 20), because the issue of jurisdiction was appealed to the federal courts in an interlocutory fashion, *Amici* do not know the events that transpired here. *Amici* do know this scenario is typical on their reservations.

trial is thus commonly possessed by Indians on the reservation, often far from (and, indeed, beyond the subpoena powers of) the nearest state court. For example, on the Colville reservation the tribal court is significantly closer to most locations on the reservation than state courts, which are located as far as fifty miles from the reservation boundary. In these circumstances, a non-Indian plaintiff may understandably prefer resolution of the case in tribal court. To hold that the tribal court *cannot* adjudicate such a case filed by a non-Indian plaintiff—when it would have exclusive subject-matter jurisdiction under *Williams v. Lee* if an Indian were the defendant—would frustrate both the plaintiff's choice of the most convenient forum and the sensible administration of justice.

Moreover, a non-Indian like the Respondent who knowingly drives a car on a reservation knows that if he or she is involved in an accident, a victim may very well be an Indian, in which case adjudication of any tort case will almost surely be in the tribal court. This is so because *LaPlante* teaches that the tribal court presumptively has jurisdiction over the case if the plaintiff is a tribal member, and *Williams v. Lee* teaches that the tribal court would have jurisdiction exclusive of state courts where an Indian is a defendant. Indeed, a non-Indian driving on the reservation may foreseeably be involved in an accident involving *both* Indian and non-Indian victims—either a multi-car accident or an accident with a non-Indian driver (say this non-Indian Petitioner) and Indian passengers (say her children, who are enrolled tribal members). In such a situation, as noted, *Williams v. Lee* holds that a state court would have no jurisdiction over the Indians (absent their voluntary filing suit in state court as plaintiffs, *see Three Affiliated Tribes v. Wold Engineering*, 476

U.S. 877 (1986)). Thus, piecemeal and duplicative litigation becomes inevitable unless the tribal court has civil subject-matter jurisdiction over the entire accident. *Compare Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 819 (1976); *LaPlante*, 480 U.S. at 16 n.8 ("In Colorado River, as here, strong federal policy concerns favored resolution in the nonfederal forum"). In addition, the tribes' interest in providing forums on the reservation to efficiently adjudicate disputes is infringed if the only way this can be done is for tribal members to use state courts that otherwise would have no jurisdiction over them.

D. *Montana*, *Brendale* and *Bourland* Do Not Preclude Exercise of Tribal Civil Adjudicatory Jurisdiction in This Case.

The Eighth Circuit *en banc* majority in the present case found that this Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 508 U.S. ——, 124 L.Ed.2d 606 (1993), required an analysis of the *Montana* test to determine tribal court authority over civil cases involving non-Indian parties. 76 F.3d at 934-35. It was error for the Eighth Circuit to apply the standards of *Montana* and these other cases, which involve tribes' legislative regulation of non-Indians on fee lands that had been taken from tribes by Congress, to a case involving a tribe's civil adjudicatory authority.

Montana, *Brendale* and *Bourland* considered statutes where Congress had divested tribes of title to reservation land with the specific purpose of opening reservations to homesteaders or taking lands for flood control projects. The Court concluded in these cases that Congress also divested tribes of regulatory control over non-Indians on the taken lands, relying on congressional intent in those

statutes. *E.g.*, *Montana*, 450 U.S. at 559-61; *Brendale*, 492 U.S. at 422-23 (opinion of Justice White), 435-37, 441-42, 446-47 (opinion of Justice Stevens); *Bourland*, 124 L.Ed.2d at 619-22. For example, in the allotment acts Congress promised and provided land to non-Indian settlers at the same time it broke up tribal lands in an effort to bring about the ultimate destruction of tribal governments. As the Court observed in *Montana*:

> [i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.[7]

450 U.S. at 560 n.9. Similarly, in *Bourland* the Court noted that Congress specifically intended for non-Indians to be able to hunt, fish and undertake other recreational activities on the lakes created by federal flood control projects on reservations. 124 L.Ed.2d at 619.

In contrast to the non-Indian activities tribes sought to regulate in *Montana*, *Brendale* and *Bourland*, Congress has

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[7] A leading scholar of federal Indian law has concluded:

> Non-Indians often obtained Indian land through fraud or sharp dealing. Yet the fact remains that the United States invited its citizens to homestead Indian land and that non-Indians accordingly built homes and livelihoods within reservation boundaries. If many entered by means of illicit if not illegal transactions born of avarice, many others came simply in pursuit of honest dreams opened up by the homestead policy . . . . Doubtless there are cases where homesteaders were altogether oblivious of the fact that their new homes were within Indian reservations. These settlers came as families to open new land, not to do business with Indians.

C. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 22-23 (Yale University Press 1987) (footnotes omitted).

never acted to take the tribal lands over which this highway was built or to divest tribes generally of authority to adjudicate civil cases with non-Indian parties, but has consistently strengthened and protected tribes' authority in this area, as shown in Part B, *supra*. Civil adjudicatory jurisdiction, moreover, is qualitatively different from the legislative regulation held precluded in *Montana*. A civil adjudication subjects the non-Indian defendant only "to the adjudicatory power of the tribunal," not the regulatory power of the tribe as in *Montana*, or the prosecutorial and penal power of the tribe as in *Oliphant*. *Cf. Duro*, 495 U.S. at 688. The court's role is comparatively passive, as a neutral arbiter, rather than active like a legislature, regulatory body or criminal prosecutor. *See Hartford Fire Ins. v. California*, —— U.S. ——, 125 L.Ed.2d 612, 650 (1993) ("[legislative jurisdiction] refers to the 'authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate' ") (Scalia, J., dissenting) (citations omitted).

The situations of the non-Indians in the present case are far different from the non-Indians in *Montana* or *Brendale* whose predecessors entered a reservation to purchase homestead lands at the invitation of the United States, assured by federal officials that the reservation would in time be extinguished, the tribal relations and jurisdiction dissolved and the tribal members assimilated. The non-Indian Petitioner is the widow and mother of tribal members who has lived on the reservation for several decades. The non-Indian Respondents entered the reservation to do business pursuant to a contract with the Tribes.

E. Applying the *Montana* Test, the Tribal Court Had Jurisdiction Over the Action.

If the Court finds that *Montana* applies here, the tribal court still had jurisdiction over this case under the two *Montana* exceptions. 450 U.S. at 565-66. The present

case exists only because the non-Indian Petitioner voluntarily filed her complaint in tribal court. Thus if "consensual relationships" are required for a tribal court to exercise jurisdiction over a civil case, *see Montana*, 450 U.S. at 565, this filing furnishes her consent. Indeed, since the tribal court would have jurisdiction over this case if the defendant were an Indian and would have jurisdiction over a suit by an Indian claiming to have been injured by Respondents, it may well be a violation of the Indian Civil Rights Act's equal protection provision, 25 U.S.C. § 1302 (8), for the tribal court to deny access to Petitioner in this case. *See Wold Engineering*, 476 U.S. at 888. Similarly, the non-Indian Respondents' entry onto the reservation to do business pursuant to a contract with the Tribes constitutes a consensual relationship with the Tribes. Furthermore, by driving an automobile on reservation roads the Respondents created circumstances in which they may foreseeably injure others, including Indians. It is clear that these activities of the non-Indian Respondents, in contrast to the non-Indians in *Montana*, *Brendale* and *Bourland*, did threaten the public health and safety and the political integrity of the Tribes.

CONCLUSION

This Court should decide that it is within the inherent tribal sovereignty of the Three Affiliated Tribes to confer jurisdiction on their tribal courts to resolve this tort case—because of the Court's established tradition of sustaining tribal court civil adjudicatory authority over cases involving non-Indians, because of Congress' assumptions about and treatment of civil adjudicatory jurisdiction and its specific actions supporting and strengthening tribal courts, and because neutral resolution of civil disputes is an essential attribute of sovereignty. This Court should reverse the Eighth Circuit and hold that the tribal courts have jurisdiction over this case.

Respectfully submitted,

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